STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

CHRISTOPHER MCKAY,

Defendant-Appellant.
_____/

Supreme Court No. 126930

Court of Appeals No. 255596

Lower Court No. 03-2007-01

WAYNE COUNTY PROSECUTOR

Attorney for Plaintiff-Appellee

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126930

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

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Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant-Appellant Christopher McKay pled no contest to bank robbery, MCL 750.531, as a fourth habitual offender, MCL 769.12, on May 5, 2003, in the Wayne County Circuit Court. On May 19, 2003, the Honorable Kym L. Worthy[1] sentenced Mr. McKay to a term of nine (9) to fifteen (15) years imprisonment.

The plea bargain provided for dismissal of an unrelated bank robbery file,[2] and the trial judge's assessment that she would likely impose a sentence of nine to fifteen years imprisonment under People v Cobbs, 443 Mich 276; 505 NW2d 208 (1993). The Cobbs evaluation was discussed over the course of several pre-trial hearing dates. The transcripts of the arraignment and final conference dates show that the parties and the trial judge were expecting a statutory sentencing guidelines range of 50 to 200 months (AT[3] 5, 13, FCT 8). The defense attorney argued at length about the positive factors in Mr. McKay's background, including family support, good work history, no weapon, no injuries to the victim, and asked the court to consider a lenient sentence (AT 7; FCT 8-9). The trial judge proposed a sentence of nine to fifteen years imprisonment at the time of arraignment (AT 16). Mr. McKay responded that he was not interested in the offer (AT 16). At the final conference date, and after the defense attorney argued for a lower Cobbs evaluation, the trial judge indicated that she was not going to "revisit" the offer (FCT 7). No action was taken at this time.

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[1] Kym Worthy is now the Wayne County Prosecutor.

[2] Mr. McKay consistently maintained his innocence of this charge (ST 11), and his attorney argued at the time of arraignment on this new charge (the arraignment was also heard before Judge Worthy) that it was "almost . . . physically impossible to do the other crime because of the time[,] distance and the different clothing description (4/25/03 Arraignment transcript p. 15) According to defense counsel, the second crime occurred within 25 minutes of the instant offense, but the instant offense occurred in Harper Woods and the second offense occurred in Canton. Id.

[3] AT refers to arraignment transcript; FCT refers to final conference transcript; PT refers to plea transcript; ST refers to sentence transcript; and PSI refers to presentence investigation report..

Mr. McKay finally accepted the plea offer, with the earlier stated Cobbs evaluation, on May 5, 2003. At the conclusion of the plea hearing, the defense attorney nevertheless advised the court that he intended to have several prominent members of the community write to the trial judge on Mr. McKay's behalf, and he hoped the trial judge would possibly change her mind about the sentence (PT 12-13). The trial judge responded, "I would say that the chances are very very minimal, highly unlikely . . . But my mind is not closed, let's put [it] that way" (PT 13).

At sentencing, the trial judge noted that the sentencing guidelines had been scored to recommend a range of 36 to 71 months, and asked whether the guidelines were correctly scored (ST 4). The prosecutor argued that Offense Variable 13 (continuing pattern of criminal activity) should be scored "25 points for this being a continuing pattern of criminal behavior involving crimes against a person (ST 5). Defense counsel disagreed because the instant conviction "I guess is a crime against a person but the other convictions are quite a ways distance away. So how many years makes a pattern, I don't know" (ST 5). The trial judge responded that "he's on parole right now . . . [f]or the armed robbery and so there's still a connection in terms of time" (ST 5). The defense attorney responded that "he's on parole but that parole started years after the armed robbery" (ST 5). The judge replied that "he's still on parole so he's still serving that sentence" (ST 6). The judge scored 25 points under OV 13 (ST 6; SIR, Appendix A).

With the 25-point assessment under OV 13, the guidelines recommended a range of 50 to 200 months (ST 6; SIR, Appendix A).

Defense counsel continued to argue all of the positive factors in Mr. McKay's case (supportive family, no injuries, father to three daughters, difficult childhood, employment in the trades, good character, 19-year relationship with wife) and asked the court to consider a sentence lower than the Cobbs assessment (ST 7). The trial judge responded that she had just sentenced

two individuals to prison for 10 to 15 years and 8 to 15 years, respectively, both for armed robbery with no prior record, and she thought the sentences were fair (ST 8). She compared Mr. McKay's criminal record (four prior felony convictions,[4] on parole for armed robbery) and stated that the promised sentence of 9 to 15 years was a "lenient sentence" and "I'm not going any lower" (ST 10). She repeated, "I'm not changing the sentence. I think it's more than fair, too lenient" (ST 10). She then offered allocution to the prosecutor and Mr. McKay (ST 10-11).

The instant offense involved a bank robbery on January 24, 2003. Mr. McKay handed a note to the teller that referred to "$100's and $50's" (PSI p.2). He held his hand in his pocket as if he had a gun (PSI p. 2) He said something to the effect of "Don't play, now, now" (PT 11), or "You see it don't play" (PSI p.2). The teller handed over the money and Mr. McKay was arrested a short time later (PSI p. 2).

The Court of Appeals denied leave to appeal on June 30, 2004 (Order, Appendix C). The Court of Appeals denied rehearing on August 24, 2004 (Order, Appendix D). Mr. McKay filed a delayed application for leave to appeal with this Court on September 1, 2004. The Michigan Supreme Court directed oral argument on this application (limited to the scoring of Offense Variable 13) by order dated February 25, 2005 (Order, Appendix E).

[4] The presentence report lists only three prior felony convictions (the three armed robbery convictions in 1990 (PSI pp. 3-4). The habitual offender notice lists the same three prior armed robbery convictions. The prosecutor nevertheless asserted at the time of the Cobbs evaluation that there were two additional felony convictions, one for larceny in a building in 1987 and one for a "drug case" in 1984 (Request and Judge's Assessment of Sentence, Appendix B). *See also*, 4/25/03 AT p. 8). Mr. McKay denied the larceny in a building conviction, but admitted the 1984 drug case (4/25/03 AT p. 9).

I. MR. MCKAY WAS DENIED HIS STATE AND FEDERAL DUE PROCESS RIGHT TO SENTENCING BASED UPON ACCURATE INFORMATION WHERE THE STATUTORY SENTENCING GUIDELINES WERE MISSCORED UNDER OFFENSE VARIABLE 13 (PATTERN OF CONTINUING CRIMINAL CONDUCT).

Issue Preservation

Defense counsel objected to the scoring of Offense Variable 13 of the statutory sentencing guidelines at the time of sentencing (ST 5-6). The challenge is therefore preserved for appeal. MCL 769.34(10); People v Kimble, 470 Mich 305; 684 NW2d 669 (2004).

Standard of Review

Interpretation of the statutory sentencing guidelines presents a question of law that is reviewed de novo by this Court. People v Kimble, supra at 308-309. *See also*, People v Libbett, 251 Mich App 353; 365; 650 NW2d 407 (2002).

Trial Court's Ruling on OV 13

At sentencing, the prosecutor proposed a scoring of twenty-five points under Offense Variable 13. Defense counsel disagreed, noting that the prior criminal record had occurred "quite a distance away" from the instant offense. The trial judge ruled in favor of the prosecutor:

> MS. DAWSON: Well, is he should get – is he scored – offense variable number 13, your Honor, he should get 25 points for this being a continuing pattern of criminal behavior involving crimes against a person.
>
> THE COURT: Mr. Plumpe.
>
> MR. PLUMPE: Don't agree. That's certainly arguable. We have here A, bank robbery which I guess is a crime against a person but the other convictions are quite a ways distance away. So how many years makes a pattern, I don't know. I would say that –

THE COURT: Well, the problem that you have, Mr. Plumpe, and we've addressed this in the past and that is that he's on parole right now.

MR. PLUMPE: I understand that.

THE COURT: For the armed robbery [convictions] and so there's still a connection in terms of time.

MR. PLUMPE: Because he's on parole but that parole started years after the armed robbery. That's all I'm saying.

THE COURT: I understand what you're saying but he is still on parole so he's still serving that sentence.

MR. PLUMPE: True. I think the Court has to make a call on that.

THE COURT: Offense variable 13.

MS. DAWSON: 25 points, your Honor. That's how I got to my initial score of 50 to 100 on the conviction the conviction and 50 to 200 on –

THE COURT: The habitual is being dismissed.

MS. DAWSON: No, he pled as charged, your Honor, the habitual is not dismissed. [ST 5-6.]

The sentencing guidelines, as scored by the trial court, recommended a range of 50 to 200 months imprisonment (SIR, Appendix A).

Although it is not entirely clear from the above-quoted passage, the trial judge was referring to three prior armed robbery convictions in 1990 for which Mr. McKay was on parole at the time of the instant offense (PSI coverpage, PSI pp. 3-4). The presentence report lists no

other felony convictions.[5] There was likewise nothing in the presentence report about other uncharged crimes, dismissed charges, or other criminal activity.[6]

In other words, the instant offense, which occurred on January 24, 2003, was considered to be "part of a pattern of criminal activity involving 3 or more crimes against a person," MCL 777.43, because the trial court held that it was sufficiently connected to three 1990 armed robbery convictions.

The Error in the Trial Court's Ruling: The Ten-Year Rule

The trial court clearly erred. The trial judge applied a version of the "ten-year rule" to the scoring of OV 13, but the ten year rule (which considers a defendant's continuing connection to the criminal justice system over a period of time between convictions) applies only to the scoring of the prior record variables. According to MCL 777.50:

> Sec. 50. (1) In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.

There is nothing in the language of Offense Variable 13 that makes any reference to the ten-year rule. Likewise, there is nothing in any of the offense variables that requires application of the ten-year rule.

The ten-year rule does not apply in situations where the Legislature has not recognized it. There is no ten-year rule applied to habitual offender enhancement, for example. People v Zinn, 217 Mich App 340; 551 NW2d 704 (1996).

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[5] See footnote 4, supra.

[6] There was another bank robbery charge that was dismissed as part of the instant plea bargain (PT 3), but Mr. McKay denied guilt of this offense at sentencing and the trial judge indicated that she would not consider it (ST 11).

While the trial judge may have been concerned with this defendant's continuing connection with the criminal justice system, the drafters of Offense Variable 13 were concerned with "all crimes [committed] within a 5-year period . . . ." MCL 777.43(2)(a). The statute focuses on the commission of *crimes*, not on whether there is a continuing connection with the criminal justice system. Defendant would also note that it is not a crime to be serving a sentence, either in prison or on parole. *Cf.* People v Kaczmarek, 464 Mich 478, 482-483; 628 NW2d 484 (2001) (probation violation is not a crime).

Offense Variable 13 Does Not Apply to the Facts of This Case

Ignoring the trial judge's mistaken application of Offense Variable13, the language of the variable does not permit points to be scored under OV 13 in this case. MCL 777.43[7] provides:

> 777.43. Offense variable 13, scoring
>
> Sec. 43. (1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age ..... **50 points**
>
> (b) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person ..... **25 points**
>
> (c) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property ..... **10 points**
>
> (d) The offense was part of a pattern of felonious criminal activity directly related to membership in a organized criminal group

[7] The statute was amended in 2002, effective March 1, 2003, to add certain drug offenses, but subsection 2 was not changed. 2002 PA 666.

..... **10 points**

(e) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against property
..... **5 points**

(f) No pattern of felonious criminal activity existed
..... **0 points**

(2) All of the following apply to scoring offense variable 13:

(a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

(b) The presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably inferred from the facts surrounding the sentencing offense.

(c) Except for offenses related to membership in an organized criminal group, do not score conduct scored in offense variable 11 or 12.

(d) Score 50 points only if the sentencing offense is first degree criminal sexual conduct.

Mr. McKay's case meets none of the above criteria. While the instant offense involves a crime against the person, *see* MCL 777.16y, it did not occur within five years of two or more crimes against a person. The 1990 armed robbery convictions occurred thirteen years earlier.

The McDaniel Decision

Mr. McKay strongly disagrees with the decision of the Court of Appeals in People v McDaniel, 256 Mich App 165; 662 NW2d 101 (2003). In McDaniel, two judges held that "any" five year period would suffice and the period need not include the sentencing offense:

> Generally, the offense variable factors of the guidelines' calculations address the circumstances of the crime for which the

defendant is sentenced. Defendant was convicted of first-degree retail fraud, a class E felony against property, which requires scoring OV 13, continuing pattern of criminal behavior. MCL 777.16r; MCR 777.22(2); MCL 777.43(1). In scoring OV 13, the court is required to score ten points where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person or property." MCL 777.43(1)(c). At issue is the interpretation of the scoring instructions in subsection 43(2)(a):

> For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

Defendant asserts, without authority or analysis, that this provision requires the sentencing court to examine the five-year period immediately preceding the offense. The prosecutor, on the other hand, argues that *any* five-year period may be utilized. We agree with the prosecutor's interpretation.

If the plain and ordinary meaning of the statutory language is clear, judicial construction is normally neither necessary nor permitted. *People v Philabaun*, 461 Mich 255, 261; 602 NW2d 371 (1999). Unless defined in the statute, every word of phrase of the statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. *People v Disimone*, 251 Mich App 605, 610; 650 NW2d 436 (2002).

The statute clearly refers to "a five-year period." The use of the indefinite article "a" reflects that no particular period is referred to in the statute. Had the Legislature intended the meaning defendant assumes, the statute would refer to "the 5-year period immediately preceding the sentencing offense." Instead, the phrase "including the sentencing offense" modifies "all crimes." That is, the sentencing offense *may* be counted as one of the three crimes in *a* five-year period. That does not, however, preclude consideration of a five-year period that does not include the sentencing offense. [256 Mich App at 171-172.]

The McDaniel case was appealed to this Court and the Court initially held it in abeyance, People v McDaniel, 668 NW2d 909 (2003), then ordered oral argument, People v McDaniel, 471 Mich 934; 690 NW2d 97 (2004), and then dismissed the appeal per stipulation of the parties, People v McDaniel, 692 NW2d 387 (2005).

The McDaniel opinion is wrong. The majority holding in McDaniel is contrary to the plain language of the statute. The Honorable Pat M. Donofrio explains this in his dissent in McDaniel:

> I believe that defendant was incorrectly scored under subsection MCL 777.43(c). The majority agrees with the prosecutor's interpretation of the statute and asserts that "[t]he use of the indefinite article 'a' reflects that no particular period is referred to in the statute. I disagree. The language at issue states that "all crimes within a 5 year period, *including the sentencing offense*, shall be counted." MCL 777.43(2)9a) (emphasis added). Because the word "shall" is used, I find it impossible for any five-year period that does not include the sentencing offense to be considered. Contrary to the majority's interpretation of the statute, my reading of the statutory language clearly precludes consideration of a five-year period that does not include the sentencing offense. Crimes outside the five-year period contemplated are already considered in the prior record variables. [256 Mich App at 173-174.]

Judge Donofrio correctly reasoned that the Legislature intended the trial judge to consider the sentencing offense in scoring OV 13. As the legislature clearly provided, "all crimes within a 5-year period, including the sentencing offense, shall be counted." "Proper syntax provides that commas usually set off words, phrases, and other sentence elements that are parenthetical or independent." Dale v Beta-C, Inc, 227 Mich App 57, 68; 574 NW2d 697 (1998). The last antecedent rule also provides that "[i]t is a general rule of grammar and of statutory construction that a modifying word or clause is confined solely to the last antecedent, unless a contrary intention appears." Sun Valley Foods Co. v Ward, 460 Mich 230, 237; 596 NW2d 119 (1999).

Using these two rules of statutory construction, it is clear that the phrase "including the sentencing offense" was meant to modify, and serve as a parenthetical of, "all crimes within a 5-year period." In other words, the sentencing judge must consider all crimes within a five-year period (including the sentencing offense), in determining whether there is a pattern of felonious conduct.

That the sentencing offense is a necessary component of the five-year period is obvious. To construe the statute in any other manner renders the phrase "including the sentencing offense" surplusage. "Courts must give effect to every word, phrase and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." State Farm Fire & Cas. Co, v Old Republic Ins. Co, 466 Mich 142, 146; 644 NW2d 715 (2002).

Moreover, if the Court considers all of the subsections of the statute as a whole, it will find that it makes no sense to remove the sentencing offense from the trial court's consideration under OV 13. In construing a statute, the act must be read in its entirely and due consideration given to all sections of a statute. People v Keeth, 193 Mich App 555, 563-564; 484 NW2d 761 (1992). Applied here, subsection 1 of MCL 777.43 repeatedly directs the sentencing court to consider whether "*The offense* was part of a pattern of felonious criminal activity . . ." MCL 777.43(1)(a)(b)(c)(d)&(e) (emphasis added). The Legislature has used the phrase "The offense was part of a pattern"*five times* in subsection 1. Id. The Legislature must have intended that the sentencing offense serve as the reference point for this statute. Accordingly, it makes no sense to eliminate consideration of the sentencing offense under subsection 2.

Even viewing the sentencing guidelines legislation as a whole, the offense variables of the guidelines were designed to capture aggravating and mitigating circumstances surrounding the sentencing offense. "'Offense characteristics' means the elements of the crime and the aggravating and mitigating factors *relating to the offense* that the commission determines are appropriate and consistent with the criteria described in section 33(1)(e) of this chapter [emphasis added]." That the sentencing offense must serve as the focal point in scoring OV 13 is consistent with the stated purpose of the offense variables.

The illogic of the McDaniels decision is also readily apparent. If "any" five-year period could be considered (and notably the legislature did not use the word "any"), the sentencing court could consider a pattern of felonious criminal activity from decades ago where the activity bears no relation to the sentencing offense (e.g. a series of felony larceny convictions from twenty years earlier where the instant offense involves murder). OV 13 was not designed for this purpose. It was designed to capture instances of "repeated felonious conduct" by an offender. "We believe that the Legislature's use of the word "pattern" and the fact that the Legislature permitted all crimes within a five-year period to be considered evinces an intention that it is repeated felonious conduct that should be considered in scoring this offense variable." People v Draper, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2004 (Docket No. 243021) (Draper opinion, Appendix F).

The "repeated" conduct referenced by the Draper decision is conduct of a specified class or category (e.g., offenses against the person or property), including and related to the sentencing offense, that occurs within a five-year period of time.

The illogic of the McDaniel decision is also apparent when that decision is considered in conjunction with the purpose of the ten-year rule under MCL 777.50. Surely, if a series of prior convictions would be considered too old to score as prior criminal record, these same convictions should not serve as the basis for finding a pattern of criminal conduct. If the convictions are sufficiently attenuated or stale for prior criminal record purposes, they are not any fresher for determining a continuing pattern of criminal behavior.[8]

[8] Notably, the point values are much higher for Prior Record Variables 1, 2, and 3 (up to 75 points for PRV 1, up to 50 points for PRV 2, and up to 30 points for PRV 3), then they are for OV 13 (maximum 25 points unless the crime involves first-degree criminal sexual conduct and there are three or more penetrations against a person less than 13 years of age).

In the case at bar, the trial judge erred in concluding that three armed robbery convictions from 1990 could be considered with the 2003 bank robbery conviction as part of a pattern of criminal behavior for purposes of scoring OV 13. There was no pattern of felonious criminal conduct within a five-year period of time. Serving a sentence (or even serving parole) is not a crime under Michigan law. People v Kaczmarek, supra.

Correctly scored, the sentencing guidelines should have reflected an assessment of zero points under OV 13, and a recommended range of 36 to 142 months. MCL 777.64 (Class C grids) (SIR, Appendix A).

Harmless Error

While the trial judge's nine-year minimum term falls within the corrected range, the error cannot be considered harmless. The range has gone from 50 to 200 months to **36 to 142 months**. There is a due process right to sentencing based upon accurate information. Townsend v Burke, 334 US 736; 68 S Ct 1252; 92 L Ed 1690 (1948); People v Malkowski, 385 Mich 244; 188 NW2d 559 (1971); US Const Amends V & XIV; Const 1963, art 1, § 17.

According to MCL 769.34(10), the Court of Appeals must affirm a sentence falling within the guidelines range "and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." By negative implication, resentencing is required where the guidelines error changes the range and/or there is inaccurate information that is relied upon at sentencing. Both occurred here. The court used inaccurate information (viz. the guidelines range constitutes an important form of sentencing information), and the guidelines error has changed the recommended range.

Moreover, according to People v Kimble, supra, the appellate courts are authorized to hear a scoring challenge even when the sentence will not represent a departure (assuming the

error is properly preserved). The Kimble Court reasoned that the language in MCL 769.10 pertains to "the circumstances under which a person may obtain sentencing relief." 470 Mich at 311 fn. 4. Again, the implication from Kimble is that a guidelines error will lead to sentencing relief.

There are only two exceptions to the implicit rule of resentencing for a guidelines error. If the range will not change despite the error, resentencing is unnecessary. People v Davis, 468 Mich 77, 83; 658 NW2d 800 (2003). And the error may be considered harmless where the trial judge has stated an intent to impose the same sentence despite the error. People v Mutchie, 468 Mich 50; 658 NW2d 154 (2002) (harmless error where court indicated intent to depart from guidelines no matter how OV 11 was scored).

But in all other respects, resentencing must occur when there is a guidelines error and the range changes. This is not the situation presented in People v Babcock, 469 Mich 247; 666 NW2d 231 (2003), where the Court stated that a reviewing court "must determine whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone." With a reduced guidelines range, and with no statement from the trial judge that s/he would have imposed the same sentence despite the reduced range, the appellate court cannot determine that the error was harmless.

To the contrary, the guidelines serve as "an invaluable tool for gauging the seriousness of a particular offense by a particular offender . . . ." People v Milbourn, 435 Mich 630, 654; 461 NW2d 1 (1990).[9] The guidelines serve as an important benchmark for the trial court's sentencing decision:

[9] Defendant recognizes that the Milbourn Court was addressing the judicial sentencing guidelines, but the principle applies equally well, if not better, to the legislative sentencing guidelines (given their statutory basis).

> Moreover, we reject the prosecutor's argument that any error in the scoring of the SIR [under the judicial guidelines] is harmless since the trial court departed from the recommendation of the sentencing guidelines. While is true that the trial judge departed from the sentencing guidelines, we cannot conclude that the error in the scoring of the guidelines was harmless. Had the guidelines been accurately scored, resulting in a lower recommendation under the guidelines, the trial court may well have imposed a lower sentence, even though that sentence might also have departed from the recommendations. That is, while the trial court might believe that a departure from the guidelines is called for in the instant case, the correct recommendation of the guidelines might nevertheless influence the size of the departure and the actual sentence imposed. Accordingly, we conclude that resentencing is in order. [People v McCracken, 172 Mich App 94, 106; 431 NW2d 840 (1988).]

The appellate courts should not and cannot determine that the trial judge would have imposed the same sentence without an express statement to this effect. It is for the trial judge to decide whether the reduced guidelines range will result in a different sentence. *See*, People v Moore, 391 Mich 426; 216 NW2d 770 (1974) (appellate court must order resentencing where trial court relies on constitutionally invalid prior conviction; only the trial judge can decide whether the sentence might have been different); People v Polus, 197 Mich App 197495 NW2d 402 (1992), *abrogated on other grounds* People v Bivens, 206 Mich App 284; 520 NW2d 711 (1994) (upon determination of guidelines error by appellate court, trial court must decide whether sentence would change in light of reduced range).

The Court of Appeals decision in People v Houston, 261 Mich App 463; 683 NW2d 192 (2004), lv gtd 471 Mich 913; 688 NW2d 509 (2004), also does not compel a different harmless error analysis. This Court is not bound by the Houston decision, and it has granted leave to appeal to consider other aspects of that decision. Moreover, in Houston the Court of Appeals held that where the corrected and uncorrected guidelines range included life, and the trial court imposed a life sentence, resentencing was unnecessary. Houston is distinguishable on its facts

because a life sentence is qualitatively different from a term of years sentence. A trial judge who imposes a life sentence has made a specific choice: that the trial judge will not set the minimum term (i.e., that the parole board will determine whether, and when, the offender should be released). In this situation, a reduced guidelines range (that nevertheless includes the option of a life sentence) is irrelevant to the trial judge's sentencing decision because the trial judge has already chosen to delegate its sentencing discretion to the parole board by imposing a life sentence.

In summary, applying the Mutchie and Davis harmless error rules to the instant case, the error cannot be considered harmless. The trial judge never stated that she would have imposed the same sentence despite a significantly reduced guidelines range. While the trial judge stated that she would not impose less than a nine-year term of imprisonment (ST 10), this decision was based on the information presented to her at the sentencing hearing. It was not based on a reduced guidelines range. To the contrary, the trial judge never considered a reduced guidelines range at the time of sentencing.

Mr. McKay would also note that the trial judge's refusal to impose a lower sentence based in part on the sentences she imposed for two unrelated armed robbery cases (ST 8) is somewhat disingenuous. Mr. McKay's offense (bank robbery) involved no actual weapon. Moreover, bank robbery is a Class C offense, while armed robbery is a Class A offense. MCL 777.16y. The trial judge's belief that "your guidelines should be a lot higher" and "[i]t's to your benefit, sir" (because bank robbery is a Class C offense) (4/25/03 AT p. 13) is simply an invalid sentencing consideration. It is the responsibility of the legislature to determine the severity of the offense. *See*, People v Hegwood, 465 Mich 432; 636 NW2d 127 (2001).[10]

[10] As indicated in footnote 1, the trial judge is no longer on the bench.

For all the above reasons, and given that Mr. McKay and his attorney argued strenuously for a lesser term throughout this case, the guidelines error cannot be considered harmless and Mr. McKay is entitled to resentencing.

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant asks this Honorable Court to grant leave to appeal, remand for resentencing or grant other appropriate relief.

Respectfully submitted,

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